

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

**RE: BAY STATE GAS COMPANY  
STAFFING AND OTHER MATTERS**

**DTE 06-31**

**MOTION FOR FINDING OF CONTEMPT AND SANCTIONS,  
FOR FAILURE TO ANSWER DISCOVERY (UWUA 1-8/SEPTEMBER 7 ORDER)**

Pursuant to 220 C.M.R. 1.06(6)(c)4., Local 273 of the Utility Workers Union of America (“UWUA”) hereby moves that the Department find Bay State Gas Company (“Company”) in contempt for its continuing failure to provide an answer to UWUA 1-8, as modified by the Hearing Officer’s order at the September 7, 2006 procedural hearing, and to impose such sanctions as the Department finds just and appropriate. In support of this motion, UWUA notes:

1. UWUA first propounded information request UWUA 1-8 on June 13, 2006:  
  
“Please provide a copy of all communications . . . between or among Steve Bryant, Dan Cote, and any other Bay State or NiSource employee, advisor or consultant, regarding the oversight hearings held by Senator Marc Pacheco of the Senate Post-Audit and Oversight Committee on or about November 5, 2005.”
2. The Company took two full weeks to respond to UWUA 1-8, and provided an objection, not a substantive answer, on June 27, 2005.
3. On July 20, and after reviewing the Company’s responses to sets 1 and 2 of its information requests, UWUA asked for a discovery conference with the Company to discuss several questions, including UWUA 1-8, that had not been adequately answered, in the view of UWUA. See Attachment A, e-mail of UWUA counsel Charles Harak to Company counsel Patricia French and Rob Dewees. The Company did not respond to this e-mail request.

4. On September 5, 2006, UWUA again asked the Company for a discovery conference, noting that there had been no response to its July 20 request for a conference and a phone call request for a conference during early August. This renewed request specifically identified UWUA 1-8 as one of the questions for which UWUA sought a substantive response. See Attachment B.

5. On or about September 6, 2006, the Company responded to UWUA's request for a substantive response to UWUA 1-8, noting that the Company maintained its objection and would not be providing any further response.

6. On September 7, 2006 the Department held a procedural conference, primarily to discuss any outstanding problems with discovery. UWUA formally "move[d] to compel answers to UWUA 1-8 and 1-11. Tr. 6.<sup>1</sup> After hearing from both sides, the Hearing Officer ordered the Company to answer a modified version of UWUA's original question, and:

"compel[led] the company to produce . . . any and all communications, e-mails, memos, notes and logs of telephone calls between or amongst Steve Bryant, Dan Cote and any other Bay State or NiSource employee, advisor, or other consultant during the year 2005."

Tr. 11. UWUA asked the Hearing Officer to clarify "that the subject be specified of those communications." The Hearing Officer did so, listing "service quality and staffing levels" and added, upon request of UWUA, "the relationship between NiSource and Bay State." Tr. 11. The Hearing Officer gave the Company "seven days from today" [i.e., September 14] to provide a complete response. Tr. 14.

7. As of September 19, 2006, the Company had provided no response to the Hearing Officer's order. UWUA sent the Company an e-mail noting that "the time for complying with

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<sup>1</sup> All record citations are to pages of the September 7 transcript.

the Hearing Officer's order has passed, yet the company has provided neither an actual response, nor an explanation of when those answers will be provided." See Attachment C.

8. As of September 25, the Company has still provided no response to the Hearing Officer's order. In addition, the Company has not informed the Hearing Officer of its lack of compliance, nor has it stated to either the Department or UWUA when it might comply, if ever.

9. By failing to provide any response to the Hearing Officer's order, or even to inform the Department, UWUA and the other parties when an answer may be forthcoming, the Company has engaged in contempt.<sup>2</sup> UWUA's original, underlying information request that gave rise to the Hearing Officer's order was first propounded on June 13. The Hearing Officer's unequivocal order was orally stated at the September 7 hearing, with a firm deadline of "seven days" from September 7<sup>th</sup>. The Department should tolerate no excuse for the Company's abject failure to comply with the Hearing Officer's clear order, or to inform the Department of that failure.

10. Under 220 C.M.R. 1.06(6)(c)4.:

"A party may move for an Order to compel compliance with its discovery request. . . . If the presiding officer finds that a party has failed to comply in a reasonable manner with a legitimate discovery request without good cause, he or she may, after issuance of an Order compelling discovery, order whatever sanctions are designed to be appropriate, including, but not limited to, those listed in rule 37 of the Massachusetts Rules of Civil Procedure."

11. Sanctions under Rule 37 include: an "order striking out pleadings or parts thereto, an order treating as contempt of court the failure to obey any orders;" requiring "the party failing

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<sup>2</sup> "Contempt: . . . 2. Conduct that defies the authority or dignity of a court or legislature. ● Because such conduct interferes with the authority of justice, it is punishable, usu. by fine or imprisonment." Black's Law Dictionary (7<sup>th</sup> Ed.)

to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure;" and a range of evidentiary sanctions. Rule 37(b).

12. UWUA suggests that all of the following sanctions are particularly relevant here:

A. Striking the testimony of Steve Bryant, for failure to produce discovery that would allow parties to adequately cross-examination the Company's key and only witness.

B. Postponing the date due for intervenor testimony until two weeks after the Company fully complies with the Hearing Officer's order.

C. Requiring the Company to pay UWUA's reasonable expenses in bringing the instant motion and the prior motion to compel heard on September 7.

13. The first sanction (striking the Bryant testimony) is appropriate as it sends a strong signal to the Company that the Department will not allow the Company to present its case in chief unless and until it fully complies with discovery orders.

14. The second sanction is especially appropriate because intervenors face a deadline of filing their testimony next week, but still do not have answers to important discovery.

15. The third sanction is essential as the Company has imposed substantial costs on UWUA by its refusal to answer discovery.

WHEREFORE, UWUA asks the Department to find the Company in contempt and to impose the sanctions listed above.

Respectfully Submitted,

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